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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SIERRA CLUB,

Petitioner,

v.

CITY OF SAN ANTONIO, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 112 F.3d 789 (5th Cir. 1997).

COUNTERSTATEMENT

Petitioner Sierra Club seeks review of an interlocutory order of the court of appeals vacating a preliminary injunction that, left undisturbed, would have restricted respondents' ability to obtain needed water supplies from their principal water source, the Edwards Aquifer ("the Edwards"). The appellate court determined that the district court abused its discretion by imposing emergency limitations on withdrawals of water from the Edwards, rather than deferring, under principles of abstention set forth in *Burford v. Sun Oil Co.*, 319

U.S. 315 (1943), to the comprehensive regulatory regime established by the State of Texas for allocating the scarce water resources of the Edwards. Moreover, because the State's regime expressly incorporates federal Endangered Species Act standards, and includes mechanisms for ensuring that such standards are complied with, the court of appeals found the district court's intervention in state water law determinations particularly unwarranted at this stage of the case.

Thus, the question presented turns on the propriety of granting preliminary injunctive relief in the unusual circumstances of this case.

A. Background.

The Edwards Aquifer is a large underground body of water located entirely in Texas. It is the principal source of water for much of south central Texas, including the one million plus citizens of San Antonio. The Edwards is enormous in size, extending about 175 miles in length and covering some 3,600 square miles. It underlies portions of eight counties: Atascosa, Bexar, Comal, Guadalupe, Hays, Kinney, Medina, and Uvalde. Its importance is equally enormous. At least 1,000 different entities, representing millions of water users -- businesses, municipal governments, water districts, associations, utilities, military bases, and private persons -- historically have withdrawn water from the Edwards and are dependent upon it for a variety of health, sanitation, safety, economic, recreational, and national defense purposes.

Growth in demand on this resource, inadequacy of existing regulations to protect interests dependent on the Edwards, its importance to the region, and the need for a comprehensive balancing of those interests led the State of

Texas, in 1993, to enact the Edwards Aquifer Act ("EAA"). The EAA sets forth a comprehensive regulatory system to regulate, manage, and provide for all of the diverse interests dependent on the Edwards, with "due regard for all competing demands for the aquifer's water." Pet. App. 9. Specific legislative findings declare that the Edwards is "a distinctive natural resource in this state, a unique aquifer" (EAA § 1.01) and that it "is the primary source of water for the residents of the region, and is vital to the general economy and welfare of this state." *Id.* § 1.04(a). The Texas Legislature therefore concluded that it is "necessary" and "appropriate" for the State to "provide for the management of the aquifer . . . consistent with [its] legal system and appropriate to the aquifer system." *Id.*

Accordingly, the EAA created the Edwards Aquifer Authority ("Authority") and gave it jurisdiction over all users of water from the Edwards. It invested the Authority with "all of the powers and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." *Id.* § 1.08.

The Authority is charged with controlling withdrawals from the Edwards, principally through a permit system. It will grant regular permits only to existing users who can establish, by convincing evidence, beneficial use of the water withdrawn between June 1, 1972 and May 31, 1993. *Id.* § 1.16. Even when a permit is granted, ceilings are placed on the amount of water a permit-holder can draw. *Id.*

In regulating withdrawals, the Authority has a number of specific responsibilities. It must, among other things, protect the quality of the Edwards; protect the quality of the surface streams to which the Edwards provides springflow;

achieve water conservation; and maximize the beneficial use of water available for withdrawal from the Edwards. *Id.* § 1.14. Of particular significance to this case, the Authority must "protect aquatic and wildlife habitat" and must "protect species that are designated as threatened or endangered under applicable federal or state law." *Id.*

The Authority is also charged with developing "a comprehensive water management plan that includes conservation, future supply, and demand management plans." *Id.* § 1.25. This responsibility includes providing for a "critical period management plan" that, in periods of crisis, would "require reductions of all discretionary use to the maximum extent feasible." *Id.* § 1.26.

B. The Sierra Club's Lawsuit.

In June 1996, in the midst of a drought affecting the Edwards and those dependent on it,[1] the Sierra Club brought this lawsuit. The lawsuit named as individual defendants the City of San Antonio and the San Antonio Water System; the United States Department of Defense and the United States Army and Air Force; other municipal governments, water districts, private corporations, associations, utilities, and private persons that use Edwards Aquifer water. Such persons were named not only in their individual capacities but as putative representatives of the class of "individuals and entities that currently pump or otherwise capture water in Uvalde, Medina, Kinney, Atascosa, Bexar, Comal or Hays Counties

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[1] The drought ended last year, shortly after the district court's preliminary injunction. Last season's rainfall in the region has substantially recharged the Edwards.

from the Edwards Aquifer." Sierra Club's First Amended Complaint ("Complaint") ¶ 25.

The basis for federal judicial intervention was a claim under the Endangered Species Act ("ESA"). The suit charged San Antonio and the other defendants with violating ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), by "taking" certain endangered and threatened species that live in springs fed by the aquifer.

Petitioner's theory was that water levels in the Edwards had been reduced by the drought and by significant uses of water by communities and industries drawing water from it. Continuation of drought conditions, and further significant use of water, could reduce water levels still further. Not only were millions of persons that depend upon the aquifer potentially affected by the depletion of this resource, but so were certain protected fishes and salamanders that live in two surface springs that are fed by the aquifer. If any of those fishes or salamanders were killed or injured as the combined result of the drought and the defendants' water use, petitioner alleged, the users of water from the aquifer would be responsible for "taking" them in violation of the ESA. Petitioner asked the district court to avoid such a result by imposing emergency restrictions on the use of Edwards water.

At the time the suit was filed, the Edwards Aquifer Act remained subject to challenge in the Texas state courts. Two-and-a-half weeks later, the Texas Supreme Court sustained the constitutionality of the EAA. In upholding the EAA, the court noted that "*the State* has the responsibility under the Texas Constitution to preserve and conserve water resources for the benefit of all Texans." *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996) (emphasis added).

The Authority convened almost immediately after the decision in *Barshop*. It conducted a number of public hearings and meetings beginning in July 1996 and continuing through the rest of the year. On votes taken on July 31, 1996 and August 17, 1996, the Authority determined that, based on the available evidence, an emergency did *not* exist at the Edwards that would warrant exercise of emergency powers. Instead, the Authority published critical period management rules for comment in early September 1996. *See* 21 Tex. Reg. 8405 (Sept. 3, 1996). In December 1996, it issued final rules for critical period management, as well as for filing and processing permit applications, which were published in February 1997 in the *Texas Register*. *See* 22 Tex. Reg. 1393-1405 (Feb. 7, 1997); 22 Tex. Reg. 1648-1671 (Feb. 11, 1997).

C. The District Court's Preliminary Injunction.

On July 10, 1996, the Sierra Club moved for a temporary restraining order and preliminary injunction. Based on evidence that several "thin" fountain darters[2] had been observed at Comal Springs,[3] the Sierra Club argued that the

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[2] The fountain darter, a one-inch long endangered fish, was the only species at issue in petitioner's preliminary injunction motion.

[3] The fountain darter lives at Comal Springs and San Marcos Springs. Complaint ¶ 58a. Its "critical habitat," designated by the Fish and Wildlife Service in accordance with the ESA, *see* 50 C.F.R. § 17.95(e) (1995), is at San Marcos Springs. Complaint ¶ 61a. Petitioner's evidence at the preliminary injunction hearing alleged "takes" only at Comal Springs, and amounted to observations of several "very thin" fountain darters out of a population of approximately 100,000 at Comal Springs. *See Sierra Club v. City of San Antonio*, 112 F.3d 789, 791 (5th Cir. 1997); Pet. App. 3.

defendants were "taking" the fountain darter and thereby violating the ESA.

San Antonio opposed the Sierra Club's application for preliminary injunctive relief on a number of grounds. Among other things, San Antonio argued that the Sierra Club was unlikely to succeed on the merits of its lawsuit because the injunctive relief it sought would interfere with efforts by the State of Texas -- as represented by the Edwards Aquifer Authority -- to exercise control over a critical state resource, thus requiring dismissal or a stay of further proceedings under the doctrine of *Burford* abstention.[4]

On August 1, the district court conducted a one-day preliminary injunction hearing. Three weeks later, on August 23, it entered the preliminary injunction. In its 10-page Order, the court acknowledged that the Authority had recently been "given the nod by the Texas Supreme Court" "to develop, implement and enforce a critical management plan that will protect the endangered species and their habitat." Pet. App. 41. Disappointed that the Authority thought no emergency existed at the Edwards, the district court brushed aside the Authority's conclusion on the theory that the Authority "has had only a limited amount of time in which to digest and prepare a plan to protect the Edwards dependent species" and "has a great learning curve to overcome before it is ready to manage the Aquifer." *Id.*

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[4] San Antonio had separately moved the district court to dismiss the action based on *Burford* abstention. The district court denied that motion on August 12, 1996. Contrary to the assertions of the Sierra Club, the district court's order denying that motion was not part of the appeal, was not addressed by the court of appeals, and is not at issue here.

The district court was apparently prepared to stand in for the Authority until the Authority could overcome that learning curve. Declaring that "an emergency exists," the court then made its central findings -- which had nothing to do with the ESA issues presented in the case -- that "[t]he Edwards Aquifer region has finally reached the point where the Aquifer is unable to provide for the needs of all those who depend upon it during dry years," and that "[w]ithout a fundamental change in the value the region places on fresh water, a major effort to conserve and reuse Aquifer water, and implemented plans to import supplemental supplies of water, the region's quality of life and economic future is imperiled." *Id.* at 40-41.[5]

In view of these determinations, which were, of course, contrary to the approach taken by the Authority, the district court commended the parties to an Emergency Withdrawal Reduction Plan that prescribed specific methods for limiting water usage from the aquifer in emergencies. It

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[5] Indeed, petitioner's only claim -- that the use of aquifer water is "taking" endangered species in violation of ESA § 9 -- seems almost incidental to the district court's decision. Except for the single, passing reference that "[t]he court is soundly convinced that . . . takes of endangered species are occurring," Pet. App. 41, there is no discussion of the issue in the court's 10-page opinion. Nor is there mention of it in the 33-page Emergency Withdrawal Reduction Plan ("Plan") that is attached to and incorporated in the court's decision. The issues that appeared to be of primary concern to the district court -- the effects of aquifer water usage on "the region's quality of life and economic future," *id.* at 41, "the health, safety, welfare and economic well-being of the people of the region," Plan at 1-2, and downstream water supply, *id.* at 1, 5-7 -- are issues committed to the Authority by the Texas legislature, but not issues presented to the district court by the Sierra Club's complaint.

then imposed specific limitations on water usage. *Id.* at 43-44. Finally, the court ordered the parties to "supply the Court and the Special Master with its base monthly winter usage"; monthly reports "as to its monthly Edwards Aquifer pumpage not later than five days after the calendar month ends"; and "all information, data, and reports necessary to keep the Court informed as to compliance with this Order." *Id.* at 48.

On September 10, 1996, the court of appeals stayed the district court's preliminary injunction pending appeal.

D. The Decision Vacating the Preliminary Injunction.

On April 30, 1997, the United States Court of Appeals for the Fifth Circuit vacated the preliminary injunction, holding that the Sierra Club had failed to meet the first requirement for a preliminary injunction: a showing of a substantial likelihood of success on the merits. *Sierra Club v. City of San Antonio*, 112 F.3d 789 (5th Cir. 1997); Pet. App. 1-30. Although it grounded its decision on the doctrine of *Burford* abstention, the court emphasized that the "issue before us is not the ultimate question of whether the district court should abstain, but whether the court properly entered a preliminary injunction. The latter question turns on whether the Sierra Club established a substantial likelihood of success on the merits in the face of the *Burford* abstention doctrine." Pet. App. 7-8.

In analyzing the likelihood of success on the merits, the court of appeals restated the fundamental principles underlying the *Burford* doctrine, as recently set forth by this Court in *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712 (1996): "[F]ederal courts should, consistent with our federal system, afford comity to state governments in carrying out their domestic policy." Pet. App. 13 (citing *Burford*, 319 U.S. at

317-18). Under *Burford*, a federal court should stay its hand when "the plaintiff's claim may be 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.* at 14 (quoting *Quackenbush*, 116 S. Ct. at 1726). The court of appeals recognized that the district court's injunction -- which imposed broad limitations on withdrawals of water from the Edwards based on the district court's determination (contrary to the Authority) that an emergency exists -- directly collided with the State's efforts to regulate the same body of water.

The court of appeals compared this situation with that presented in *Burford*. The Fifth Circuit emphasized the vital state interest in the aquifer and the fact that the aquifer "contains a finite amount of water, and as such, the need for uniform regulation is paramount." *Id.* at 12. As "with the oil fields at issue in [*Burford*], in the present case, Texas clearly has an interest in uniform decision-making regarding this finite amount of water." *Id.* at 13 (citation omitted).

Accordingly, the court of appeals concluded that the district court erred in granting the preliminary injunction. Judge Benavides dissented.

REASONS FOR DENYING THE WRIT

1. As a preliminary matter, this case's interlocutory posture makes it especially inappropriate for a grant of certiorari. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where -- unlike this case -- the court of appeals has decided the merits. *E.g., Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari where "[t]he Court of Appeals vacated the judgment . . . in favor of petitioners, and

remanded the case to the District Court for determination of an appropriate remedy."). *See also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

Here, the court of appeals vacated the district court's preliminary injunction, but did not resolve the case on its merits. As the court of appeals emphasized, the "issue before us is *not the ultimate question of whether the district court should abstain*"; rather the issue was "*whether the court properly entered a preliminary injunction.*" Pet. App. 7-8 (emphasis added). This latter question, the court of appeals continued, "turns on whether the Sierra Club established a substantial likelihood of success on the merits in the face of the *Burford* abstention doctrine." *Id.* at 8.

Thus, the decision below holds only that petitioner had not demonstrated a likelihood of success because of the *likelihood* that *Burford* abstention would bar the district court from granting relief. The appellate court expressly left open the ultimate disposition of the merits:

> The rationale of *Burford* abstention is served by the state's regulation of this enormous water resource rather than by the federal court. *At least, that appears to be true from this preliminary injunction record. We state no bar against the Sierra Club, either in pursuing the merits or in ultimate efforts to protect the water and darters if the State of Texas fails to do so.*

Id. at 17 (emphasis added). Accordingly, although the decision below directly addresses *Burford* abstention, the issue before this Court, properly stated, remains the same as it was in the court of appeals: whether petitioner met its burden of demonstrating the requirements for issuance of a preliminary injunction.[6] Indeed, the interlocutory character of the appeal is heightened here since the possibility of enforcement in federal court in the future remains open if the State fails to protect federal interests.[7]

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[6] Were the Court to accept the case to determine whether the court of appeals correctly vacated the preliminary injunction, it would be necessary to consider, in addition to the abstention issue, petitioner's substantive ESA claims, for they affect the probability of success on the merits. Petitioner's claim is that thousands, or millions, of users of water, acting independently and without specific knowledge, are somehow engaged in "taking" wildlife when their combined actions, along with abnormally dry weather conditions, lower the water levels in certain springs, making it harder for darters to survive in those springs.

The notion that the combined effect of drought conditions and the product of combined actions by thousands of individual actors would be a "take" pushes the notion of causation and the concept of a "take" of wildlife far beyond the plausible. *See generally Pyramid Lake Paiute Tribe v. United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (impossible to suggest that any particular user has actually caused the harm to the species). It is plain that such merits issues would better be addressed on a full and complete record. Such a record is best considered in the first instance in the context of the overall administrative scheme established by the State.

[7] Nor is federal protection unavailing in the interim. The Fish and Wildlife Service ("FWS") -- the federal agency charged with administering and enforcing the ESA -- has enforcement powers, *see* ESA § 11, 16 U.S.C. § 1540, that can be exercised in full harmony with the

(continued...)

2. Petitioner is incorrect in arguing that the case presents important issues about *Burford* abstention warranting the attention of this Court.

a. The application of *Burford* abstention to particular cases is highly fact-specific. Indeed, the "cases do not provide a formulaic test for determining when dismissal under *Burford* is appropriate." *Quackenbush*, 116 S. Ct. at 1726. Moreover, the proper application of the *Burford* doctrine has been explained by this Court in several decisions, including two recent decisions that, along with *Burford* itself, were the focus of the court of appeals' analysis. As the decision of the court of appeals illustrates, this Court's precedents provide clear, concrete and flexible guidance to the lower courts in applying the doctrine to the many settings in which *Burford* issues arise.

b. The court of appeals was plainly correct in concluding that "abstention appears . . . manifestly warranted under *Burford*." Pet. App. 8. Indeed, this is a compelling case for abstention under that doctrine.

Burford requires a federal court to decline to exercise equitable jurisdiction (a) where federal review would be disruptive of State efforts to establish coherent policy with respect to a matter of substantial public concern, or (b) when there are difficult questions of state law bearing on policy problems of substantial importance. *Quackenbush*, 116 S. Ct. at 1726; *Burford*, 319 U.S. at 315. Moreover, under the teaching of *New Orleans Pub. Serv., Inc. v. Council of City of*

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[7](...continued)
abstention ruling of the court of appeals. Not insignificantly, perhaps, FWS has not thus far shared the district court's view that enforcement is warranted here.

New Orleans, 491 U.S. 350 (1989) ("NOPSI"), where the assertion of federal court jurisdiction would "interfere with proceedings or orders of state administrative agencies," "a federal court sitting in equity *must* decline" to exercise jurisdiction. *Id.* at 361 (emphasis added).

The application of these principles in this case was relatively straightforward. Under the EAA, the Edwards Aquifer Authority has been granted "all the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." EAA § 1.08. As the court of appeals recognized, the preliminary injunction interfered with the Authority's exercise of its administrative authority and disrupted State efforts to establish a coherent policy concerning this crucial State resource. The injunction directly contradicted -- in effect, set aside -- the determination of the Authority.

The Edwards Aquifer Act represents a comprehensive effort to protect and regulate the use of a valuable, and limited, state resource, mediating and reconciling the competing demands for aquifer water. Reconciliation of competing claims by different groups of citizens to a limited resource -- involving different users, different types of users, different industries and different municipalities -- exemplifies the type of policy judgment appropriate for resolution as part of a state administrative process; it is not suitable for disposition by a federal court. As the court of appeals observed, precisely because the "aquifer contains a finite amount of water . . . the need for uniform regulation is paramount." Pet. App. 12. Where uniform regulation is required, deference must be afforded a state administrative process established to address such issues. The federal courts should resist establishing a

competing scheme of overlapping federal *judicial* control over that same resource.

Not only is the Authority charged with the responsibility of monitoring and preserving this valuable state resource, but it is also charged with conserving endangered or threatened species. The Authority is specifically required by the Act to implement these difficult and significant public policy judgments in a manner consistent with environmental laws protecting "species . . . that are designated as threatened or endangered under applicable federal or state law." EAA § 1.14. Thus, there is no reason why federal interests cannot be accommodated within the state administrative scheme.

In contrast, federal jurisdiction here would represent a classic illustration of the tail wagging the dog. Based on its view that depletion of the aquifer as the result of drought and significant use will affect a particular endangered species, just as it will affect millions of other users in the region, the federal district court assumed broad jurisdiction over use of the aquifer, freely substituting its judgment and fact-finding for that of the Authority. As the district court's decision demonstrates, its assumption of jurisdiction contemplated broad declarations and judgments about the proper way to protect and use the aquifer generally. Pet. App. 40-49. The court's pronouncements were tied only superficially, if at all, to the ESA issues that provided the ostensible basis for the exercise of federal jurisdiction. Indeed, at the core of the district court's decision was its clearly expressed disagreement with the Authority's determination that there was, as yet, no water emergency that required imposition of emergency measures. *Id.* at 55.

Where, as here, the State has established an administrative scheme to reconcile competing policy

considerations -- particularly ones that involve competition for limited state resources, and the reconciliation of future demands for that resource with immediate needs -- the federal courts should be extremely reluctant to intrude. That reluctance is reflected in the doctrine of *Burford* abstention, which manifestly applies here.[8]

c. Petitioner's lead argument rests on the proposition that for abstention to apply, "the relief being sought must be discretionary" (Pet. 14-15), for which petitioner cites *Quackenbush*. In *Quackenbush*, of course, this Court noted that abstention has its roots in the understanding

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[8] There is ample illustration in the case law from the circuit courts as to why *Burford* abstention is appropriate in circumstances such as these. *See, e.g., Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 315 (5th Cir. 1993) (upholding *Burford* abstention where "[b]y proceeding, the district court would have risked reaching a different answer than the [state] institutions with greater interest in and familiarity with such matters."); *Barnhardt Marine Ins., Inc. v. New England Int'l Surety of Am., Inc.*, 961 F.2d 529, 532 (5th Cir. 1992) (affirming *Burford* abstention where federal action would have "encroach[ed] upon the exclusive power" granted by the state legislature to a state administrative body); *DuBroff v. DuBroff*, 833 F.2d 557, 561 (5th Cir. 1987) (affirming *Burford* abstention to prevent federal court intrusion into state administrative scheme); *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1247 (2d Cir. 1992) (affirming *Burford* abstention where federal court jurisdiction would interfere with a complex state administrative process); *Brandenburg v. Seidel*, 859 F.2d 1179, 1191 (4th Cir. 1988) (affirming *Burford* abstention where federal action would "disrupt the state's efforts to provide a unified method" for addressing a matter of state concern); *Levy v. Lewis*, 635 F.2d 960, 964 (2d Cir. 1980) (district court should have abstained on *Burford* grounds where federal review of a federal question would have interfered with a state administrative process).

that a federal court ordinarily has the authority to stay its hand *when it acts as a court of equity*. 116 S. Ct. at 1720-21, 1724-25. Thus, the Court referred to "discretion" in the context of "the discretionary power of a federal court sitting in equity." *Id.* at 1725.

Petitioner's claim in this case clearly calls upon the district court to exercise its *equitable* powers, and is therefore the type of claim that may, in a proper circumstance, require the federal court to give way to principles of comity and respect for state authority that form the foundation of *Burford* abstention.[9] Moreover, even if there were a requirement that there be a separate "discretionary" aspect of the claim, the order of the district court granting the preliminary injunction well illustrates the breadth of remedial discretion at issue in this case. Pet. App. 40-49.

The same confusion infects petitioner's assertion that *Tennessee Valley Authority v. Hill*[10] eliminates district court "discretion," and thus bars abstention, in these circumstances. *TVA v. Hill*, at best, states a substantive rule of law concerning the proper application of the ESA. Even if it were true, as petitioner asserts, that *TVA v. Hill* mandates the protection of

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[9] This Court's discussion in *Quackenbush* was addressed to the question whether the Court had the power to dismiss or remand a case on abstention grounds where no equitable relief was sought. The Court held that where only damages are sought, it is generally inappropriate *to dismiss* or remand, though lesser relief, such as a stay, may be appropriate. 116 S. Ct. at 1725.

[10] 437 U.S. 153 (1978).

individual species members in absolute terms,[11] a federal court asked to apply that substantive rule of law still acts as a court of equity, thus providing the traditional predicate for abstention in a proper circumstance. Moreover, even if there were, as petitioner intimates, an absolute obligation, at all cost, to protect the life of every individual member of an endangered or threatened species, that would still leave discretion in the district court to determine *how* best to implement that protection in the situation presented here -- involving a limited

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[11] *TVA* involved a violation of ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2), whereas the Sierra Club charges San Antonio here with violating ESA § 9, 16 U.S.C. § 1538. ESA § 7(a)(2), by its terms, involves the question of "jeopardy" to a listed *species*; ESA § 9, in contrast, involves the "take" -- *i.e.*, the death or injury -- of a single animal, an *individual member* of a listed species.

This distinction is important. Four years after *TVA*, the Court had occasion to explain that its holding in *TVA* was not susceptible to broad application because it was dictated by "a statutory provision [ESA § 7] whose terms were" perfectly plain in setting forth "a flat ban on the destruction of critical habitats." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982). The Court emphasized that it was "conceded" in *TVA* that completion of a dam "would eliminate an endangered species by destroying its critical habitat." *Id.* at 314. Thus, "there was no room for compromise between the federal project and the statutory objective to preserve an endangered species; either the snail darter or the completion of the Tellico Dam had to be sacrificed." *Id.* at 332-33 (Stevens, J., dissenting); *see also id.* at 313 (majority opinion). That is not the case where, as here, the "take" of individual animals is alleged but no extinction risk to the species is presented.

resource affected by naturally occurring conditions, such as drought, and by millions of water users.[12]

Indeed, petitioner makes a basic mistake when it asserts that the ESA somehow bars abstention. Petitioner confuses the substantive rule of decision under the ESA, with the doctrine of abstention, a procedural and jurisdictional device that seeks to accommodate interests of federalism. Abstention does not change the rule of decision; even after abstention, federal law remains "supreme" and controlling. On the other hand, where the application of federal law is entangled with complex issues of state law and state policy, *Burford* abstention requires courts to stay their hand to allow specialized administrative bodies, established for that purpose, to do their job without undue federal interference. Abstention simply allows state administrative bodies and state courts to address a problem in the first instance.

d. The unique nature of the state administrative framework at issue here belies petitioner's assertion that the decision of the court of appeals will unleash a parade of horribles, undermining all manner of environmental and civil rights enforcement in the federal courts. The decision of the court of appeals falls squarely within the mainstream of case law applying the *Burford* doctrine. Indeed, the case presents close parallels to *Burford* itself. *See* Pet. App. 8-15. Thus, petitioner's assertion that the "parties can virtually always point

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[12] As noted above, even if the depletion of aquifer reserves, resulting from the combined drought and water usage by thousands of individual users, might be said to contribute to the death of a species member, it remains impossible to describe the usage of water by any individual user as an actionable "take" under § 9 of the ESA. *See* n.6 *supra*.

to *some state policy* . . . that would be directly or indirectly affected by enforcement of the anti-take provisions of the ESA" (Pet. 19) (emphasis supplied), ignores the specific nature of the state policy decisions -- involving the allocation of a scarce resource among competing users -- at issue here.[13] It also disregards the fact that the state regulatory regime *incorporates* federal ESA requirements, thus making it an integral part of the administrative decision-making process.

Equally far-fetched is petitioner's assertion that the holding of the court below will somehow undermine federal enforcement of "critical civil rights" laws on the theory that federal abstention will now be required whenever there exists a parallel state administrative mechanism. *Id.* at 17. The administrative process established by the State here is not merely some form of parallel state enforcement of federal law. To the contrary, it involves public policy judgments about the allocation of scarce state resources prototypically appropriate for determination by *state* administrative agencies. The problem being addressed requires "unified management and decision-making." Pet. App. 11. The decisions to be made must combine scientific knowledge about the condition of the aquifer, with predictions about the weather, and planning about future economic development. This is precisely the type of administrative structure -- designed to address concerns that are uniquely within the State's realm -- that this Court identified in *Burford* itself as requiring abstention. *Id.* at 11-13. The

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[13] Indeed, the court of appeals expressly cautioned that its decision in these unique circumstances should not be read as a broadening of the reach of the *Burford* abstention doctrine. It *agreed* with the Sierra Club that "as a general proposition, a State should not be able to create a regulatory scheme and then claim that federal regulation of the same subject matter does not apply." Pet. App. 18.

decision below foretells no general displacement of civil rights or environmental enforcement from the federal courts.[14]

e. Petitioner's argument that *Burford* abstention "is *inapplicable* if only federal claims are raised" (Pet. 18) is also misguided.[15] *Burford* itself held that abstention may be appropriate "whether jurisdiction is invoked on grounds of diversity of citizenship *or otherwise* . . . ." 319 U.S. at 317-18 (emphasis added). It has been suggested that "the federal basis of jurisdiction may raise the level of justification needed for abstention." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976). In fact, the court of appeals here expressly acknowledged that "one factor is [sic] deciding whether *Burford* abstention should apply is whether the cause of action arises under federal or state law." Pet. App. 13. But the fact that the plaintiff purports to raise federal claims, or solely federal claims, does not preclude abstention where the plaintiff's claim will actually entangle the federal court in issues of state law or policy.

The issue as defined by this Court is *not* governed by how the plaintiff pleads its claim under state or federal law, but rather on whether the resolution of the claim is "in any way entangled in a skein of state law that must be untangled

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[14] We know of no other ESA case, before or since the Fifth Circuit's decision, in which the *Burford* abstention doctrine has been argued, much less applied.

[15] *Burford* involved a federal constitutional claim. Efforts have occasionally been made to distinguish *Burford* on the theory that abstention was especially appropriate in that case precisely because federal constitutional claims were raised. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976).

before the federal case can proceed." *Id.* at 14 (quoting *Quackenbush*, 116 S. Ct. at 1726).[16] Thus, the decision whether to abstain requires an assessment of the extent to which the exercise of federal jurisdiction over the cause will interfere with state administrative processes and undermine the primacy of *state* authority on matters of *state* policy and *state* law. As the plain terms of the district court's preliminary injunction show, it is impossible to frame injunctive relief here without becoming entangled in the complex of regulatory judgments, reflecting both state law and state policy, that are the responsibility of the Edwards Aquifer Authority.[17]

Neither is there much to petitioner's half-hearted claim of a conflict in the circuits. Petitioner cites a footnote in a

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[16] Indeed, *Quackenbush* itself makes clear that *Burford* abstention may be proper if the federal suit involves a state-law claim *or* a federal claim enmeshed in a web of state law. *See* 116 S. Ct. at 1726.

[17] Numerous appellate decisions finding abstention proper involve federal questions. *See DuBroff v. DuBroff*, 833 F.2d 557 (5th Cir. 1987) (RICO claim); *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980) (ERISA claim); *Aluminum Co. of Am. v. Utilities Comm'n of State of N.C.*, 713 F.2d 1024 (4th Cir. 1983) (federal preemption and impermissible burden on interstate commerce), *cert. denied*, 465 U.S. 1052 (1984); *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239 (2d Cir. 1992) (§ 1983 action); *Browning-Ferris, Inc. v. Baltimore County, Md.*, 774 F.2d 77 (4th Cir. 1985) (same); *Caleb Stowe Assoc. v. County of Albemarle, Va.*, 724 F.2d 1079 (4th Cir. 1984) (same); *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319 (4th Cir.) (same), *cert. denied*, 115 S. Ct. 192 (1994); *Brandenberg v. First Md. Sav. and Loan, Inc.*, 660 F. Supp. 717 (D. Md. 1987) (RICO claim), *aff'd sub nom. Brandenberg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.) (various federal statutes and regulations governing emergency aid to needy families with children), *aff'd sub nom. Canady v. Valentin*, 768 F.2d 501 (2d Cir. 1985).

Ninth Circuit opinion that focused on a different doctrine -- *Colorado River* abstention -- and its application to a water rights dispute arising from an Indian treaty with the United States. *See United States v. Adair*, 723 F.2d 1394, 1402 n.5 (9th Cir. 1983), *cert. denied*, *Oregon v. United States*, 467 U.S. 1252 (1984). In a single, cryptic sentence in that footnote,[18] the court of appeals seemed to imply -- without citation or analysis -- that *Burford* abstention was not appropriate in a case involving a federal claim. *Id.* In any event, that unelaborated comment by the Ninth Circuit was made in 1983, and thus long predates this Court's more recent guidance on the issue.[19] Petitioner's interpretation of that footnote is not followed even within the Ninth Circuit, which otherwise has consistently addressed abstention issues *without* suggesting that abstention is inappropriate where only federal claims are directly raised by the plaintiff. *See Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 297 (9th Cir. 1996)

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[18] The Ninth Circuit stated in that footnote: "Unlike *Colorado River*, all claims raised in the federal suit here have their genesis in federal law. Thus, we find no occasion to apply *Burford* abstention." *Id.* The case was one in which the district court had itself narrowed the scope of its own jurisdiction to avoid any interference with the state adjudication of water rights. *Id.* at 1399.

[19] Equally untenable is petitioner's assertion that there is a conflict with the First Circuit which requires that the administrative proceeding itself be subject to review. *See* Pet. at 18. In fact, as described by this Court, the inquiry turns on *interference with* state administrative processes, not direct review of administrative orders. *Quackenbush*, 116 S. Ct. at 1725-26. Even if there was such a requirement -- and there exists no support for that notion in the case law -- the district court's injunction here overturned the Authority's finding of a non-emergency and the Authority's water allocation scheme.

(finding *Burford* abstention proper in a case where only federal claims are expressly raised); *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1031 (9th Cir. 1989) (finding *Burford* inappropriate in a case involving only federal claims, not on the basis or reasoning of the *Adair* footnote, but because the case "does not involve difficult questions of state law"), *cert. granted in part on other grounds*, 496 U.S. 935 (1990).

f. There is no support for petitioner's off-hand suggestion that the *"sine qua non"* of *Burford* abstention is the existence of timely state court review of the administrative action, which, petitioner argues, is somehow absent here. Pet. 17. To the contrary, it is clear that the Authority is subject to the Texas Administrative Procedure Act.[20] Both here and in the court below, Sierra Club tries to raise issues of standing under that Act -- issues which the federal courts, of course, are unable to address. Sierra Club's standing argument is thus entirely hypothetical within the context of this case. What is important, however, is that the administrative process in question would be answerable through judicial process for any failure to enforce the law. *See* Pet. App. 17.

Despite petitioner's apparent distrust of the Texas state courts, there is no reason to suppose that these courts would be less than vigilant in reviewing the Authority's compliance with

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[20] The Texas Supreme Court in *Barshop* held that the EAA implicitly includes within its terms judicial review provisions, stemming principally from Section 1.11(h)'s requirement that the Authority "is subject . . . to the Administrative Procedure and Texas Register Act." 925 S.W.2d at 636. As the Court held, this language requires "contested case hearings and judicial review of the findings from such hearings under the substantial evidence rule." *Id.*

the EAA's mandate to protect species "that are designated as threatened or endangered under applicable federal or state law." EAA § 1.14. The state courts would also have jurisdiction to hear claims directly arising under the ESA in such circumstances since jurisdiction under that statute is not exclusively federal and, absent such a jurisdictional limitation, the state courts presumptively enjoy concurrent jurisdiction over those federal claims. *See Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990) ("state courts have inherent authority, and thus are presumptively competent, to adjudicate claims arising under the laws of the United States").

In any case, if, despite the EAA, the Authority were to fail to protect endangered species, and even assuming that the state courts were not available to review that failure, the decision of the court of appeals does not preclude the further attention of the federal courts as respects the federal issue: the district court retains jurisdiction on remand, and the federal courts would be available to consider the implications of any breakdown in the state administrative and judicial system. However, petitioner's approach would simply pretermit the administrative process altogether, ignoring the Authority's own obligation to act in a manner consistent *with* federal law.

3. The second question presented by the Petition -- concerning an asserted inconsistency between the decision below and *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) -- is also not worthy of review. Indeed, the question rests on a fundamental misunderstanding of principles of appellate jurisdiction, coupled with a misperception of the scope of the court of appeals' decision.

Citing *Mayacamas*, the Petition notes that an order by a district court refusing to abstain is not an appealable order (Pet. 20), and on this basis, insists that the court of appeals

here should not have reached the abstention question. It is true enough, of course, that an order denying a motion to dismiss on abstention grounds does not qualify as an appealable order under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1). *Mayacamas* held that these statutory requirements for an appealable order cannot be circumvented by seeking to characterize a ruling denying a motion to dismiss or to stay as either a "collateral order" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) or as a quasi-injunctive order under the erstwhile *Enelow-Ettelson* rule, which doctrine the Court put to rest for good in *Mayacamas*.

The mistake petitioner makes is that the basis for appellate jurisdiction in the court below was *not* the order of the district court denying San Antonio's motion to dismiss. Respondents never sought review of that order, and the court of appeals did not review it. *See* Pet. App. 7-8. The only order that was the subject of the appeal was the district court's preliminary injunction order. And, as to such orders, *Mayacamas* changes nothing. As the Court there expressly noted, "Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions. . . ." 485 U.S. at 287. That was the clear basis for jurisdiction below.

In reviewing the district court's entry of the preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1), the court of appeals necessarily considered the propriety of abstaining under *Burford* because, as it explained, "[w]hether the court should have abstained goes directly to whether the plaintiff was likely to succeed on the merits." Pet. App. 7 n.11. Appeal of an order granting or denying a preliminary injunction plainly encompasses all of the issues relevant to the district court's decision to grant the injunction, including the issue whether

abstention will make it unlikely that petitioner's claims will succeed.[21] Preliminary injunctions could not be meaningfully reviewed if, as petitioner suggests, certain issues (like abstention) bearing on the propriety of an injunction were simply declared off-limits to the appellate courts.[22]

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[21] *See Brooks v. New Hampshire Sup. Ct.*, 80 F.3d 633, 637 (1st Cir. 1996) ("The primary integer in the preliminary injunction calculus is the plaintiff's probability of success on the merits . . . . When [abstention] applies, the district court must refrain from reaching the merits of the plaintiff's claims and, thus, there is no real possibility -- let alone a likelihood -- that the plaintiff will succeed in his action.") The courts of appeals are frequently called upon to decide jurisdictional issues on appeal of preliminary injunctions. *E.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (reversing decision granting preliminary injunction where the district court should have abstained); *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995) (vacating preliminary injunction and remanding with instructions to dismiss for lack of subject matter jurisdiction); *Baldwin Metals Co., Inc. v. Donovan*, 642 F.2d 768 (5th Cir.) (vacating preliminary injunction and remanding to the district court with instructions to dismiss action in light of exhaustion of administrative remedies and principles of equity jurisdiction), *cert. denied*, 454 U.S. 893 (1981).

[22] Petitioner claims that in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), this Court "carefully separated" abstention issues from the "likelihood of success" inquiry in reviewing a preliminary injunction order. Pet. 14, 21. This is a bizarre reading of *Doran*, which has nothing to do with the question presented. In that case, three topless bars succeeded in obtaining a preliminary injunction from a federal court that prevented enforcement against them of a local ordinance that banned topless dancing. However, prior to issuance of the injunction, one of the bars defied the ordinance by permitting its dancers to go topless, thereby subjecting itself to state criminal proceedings under the ordinance. The other two bars complied with the ordinance until they succeeded in

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On the other hand, the court of appeals did not finally resolve the question of whether *Burford* abstention provides a basis for dismissing the action: "The issue before us is not the ultimate question of whether the district court should abstain, but whether the court properly entered a preliminary injunction." *Id.* at 7-8. It left open the possibility that abstention might not apply on a fully developed record should circumstances change; the court held simply that such an outcome was very unlikely based on the record as it now stands.[23]

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[22](...continued)
obtaining the injunction from the district court. In these circumstances, the Court was asked to resolve the applicability to the three bars of *Younger* abstention -- which generally precludes federal courts from enjoining state criminal proceedings. The Court held, straightforwardly enough, that *Younger* abstention precluded a federal court injunction against the one bar that was subject to ongoing state criminal proceedings, but did not apply to the other two bars that were not being prosecuted. There is literally nothing in the *Doran* opinion of relevance here.

[23] Even had the court of appeals passed on the merits of the trial court's denial of respondents' motion to dismiss on abstention grounds in its review of the injunctive order -- which it did not do -- such a procedure would in any event not present a conflict with this Court's cases. As the Petition concedes (Pet. 21), this Court held long ago that it may be appropriate in certain circumstances to do just that. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court of appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss). And, contrary to the suggestion made by petitioner, nothing in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995) altered that rule. Indeed, the Court in *Swint* cited *Deckert* for the proposition that its cases "have not universally required courts of appeals to confine review to the precise decision independently subject to appeal." *Id.* at 50.

The court of appeals' decision is, in this sense, a perfectly ordinary example of an appellate court reviewing a preliminary injunction order to ensure that the trial court properly evaluated the traditional four prerequisites to the entry of such an order. Its assessment of the abstention issue was no different from the consideration of any other merits question in deciding whether the moving party had carried its burden of demonstrating "a likelihood of success on the merits." In like circumstances, other lower courts have repeatedly done just what was done here: considered the propriety of abstention in reviewing grants or denials of preliminary injunctions. *E.g.*, *Brooks v. New Hampshire Sup. Ct.*, 80 F.3d 633, 637 (1st Cir. 1996) (affirming denial of preliminary injunction request based on abstention); *Jayaraj v. Scappini*, 66 F.3d 36 (2d Cir. 1995) (vacating district court's preliminary injunction on abstention grounds); *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628 (3d Cir. 1991) (affirming district court's denial of preliminary injunction based on abstention grounds).

In sum, petitioner pointedly mischaracterizes the holding below when it asserts that the court of appeals addressed the "district court's denial of a motion to abstain." Pet. 20. In fact, the court of appeals *declined* to do so. There is no reason why a court evaluating the grant of a preliminary injunction should not have the authority to determine whether the district court had jurisdiction and authority to proceed with the case. That is all the lower court here did. There is nothing in such an inquiry that warrants this Court's review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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